Jacee Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO. Cases 4–CA–28979 and 4–RC–19914

August 27, 2001

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On September 20, 2000, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

For the reasons stated by the judge, we adopt his findings that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee, by threatening to close its business if employees selected the Union as their collective-bargaining representative, and by promising an employee benefits if he abandoned his support for the Union. Contrary to our dissenting colleague, we also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employee Robert Hearon on February 24, 2000,[4] because of his suspected union activities. The facts, fully set forth in the judge's decision, are summarized below.

The Respondent, an electrical service company located in Pennsylvania, is owned by John Corelli, who operates the company from his home in Florida. The Respondent employed two electricians, Bill Cowan and Justin Waid, who had been with it since 1996. The Respondent also employed two apprentice/helpers, Robert Hearon and Charles Vandenberg. The Respondent hired Hearon on January 25, and Vandenberg was hired approximately 1 week later.

Hearon and Waid signed union authorization cards on February 16. On February 17, the Union filed a representation petition and faxed a copy to the Respondent, which Corelli received that day. February 17 was the last day Hearon actually worked for Jacee. Vandenberg was discharged on February 18.[5] Hearon telephoned Corelli on February 18, 21, 22, 23, and 24, inquiring as to the availability of work. Corelli told him that no work was available. On February 24, Corelli told Hearon to stop calling him, to file for unemployment insurance, and to look for another job.

Citing, inter alia, Hearon's union activity, the Respondent's general knowledge of the union campaign, its hostility toward that campaign, and the timing of the layoff, the judge found (and our dissenting colleague does not dispute) that the General Counsel has demonstrated that antiunion animus was a motivating factor in the layoff decision.[6] After carefully considering all the record evidence, the judge also found that the Respondent "has not provided a persuasive economic justification" for laying Hearon off on February 24.

Our dissenting colleague would reverse the considered judgment of the judge. Most significant, according to the dissent, is that the Respondent did not hire any employees to replace Hearon for 5 months following Hearon's layoff.

The judge considered that fact, but properly declined to give it controlling weight. Instead, the judge correctly focused on the information known to Corelli on February 24, when he made the layoff decision. Citing the following factors, the judge found, and we agree, that the Respondent's explanation for the Hearon layoff is pretextual.

First, the record shows that the Respondent had never before responded to a drop in business with layoffs. The judge specifically did not credit Corelli's testimony that he had laid off employees previously. Rather, the judge found that the Respondent's past practice was to employ apprentice/helpers for extended periods of time even when its sales figures declined. Indeed, the judge found that there was "no relationship between [the Respondent's] sales and the number of electrical workers it em-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to add an expunction remedy.

We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001).

[4] All dates refer to 2000 unless otherwise indicated.

[5] Vandenberg's discharge is not alleged to be an unfair labor practice.

[6] The dissent "assume[s] arguendo" that the General Counsel has met his burden in this regard.

ploys." Although the dissent argues that the record does not support the judge's finding and that his statement "belies economic common-sense[,]" the record amply demonstrates that the size of the Respondent's work force has remained steady in the past even as its sales figures fluctuated. The pattern of the Respondent's conduct immediately shifted following its receipt of the Union's representation petition, however, supporting the conclusion that the Respondent's explanation for Hearon's layoff is pretextual.

Second, Corelli testified that the Respondent normally needed additional help in the winter. When Corelli laid off Hearon, there was another month of winter left, and there was no reason for Corelli to assume that he would not need an apprentice/helper for an extended period of time. Although our dissenting colleague asserts that Corelli did not need any additional help after February 17, Hearon's last day of work, this assertion is contradicted by Waid. Waid testified that work during the week of February 22 "was busy."[7] Nonetheless, Corelli told Waid that he would not be getting a helper to assist him with his work.[8] Waid's account of his February 22 conversation with Corelli is credited by the judge.[9] Thus, not only did the Respondent usually need additional help during this time period but, in fact, the Respondent actually did need help during the week in question.[10]

Third, the Respondent presented shifting reasons for Hearon's layoff. The Respondent's initial defense, as stated in its answer, was that "Hearon was laid off because work was not available, and because he had frequently become unavailable for work and had absented himself voluntarily from work." At trial, the Respondent abandoned the assertions that Hearon's unavailability or absences were a reason for his layoff when Corelli testified that he would have rehired Hearon had there been sufficient work. Contrary to the assertions of our dissenting colleague, therefore, the Respondent's explanations for Hearon's layoff are contradictory. As concluded by the judge, the Respondent's varying rationales for its conduct lead to the inference that the real reason for the layoff is not among those asserted by the Respondent. *Sound One Corp.*, 317 NLRB 854, 858 (1995), enfd. 104 F.3d 356 (2d Cir. 1996).

Under these circumstances, where the layoff represented sharp departure from past practice, where the latest reason proffered by the Respondent does not withstand scrutiny, and where the Respondent has presented shifting defenses, we find that the judge was warranted in rejecting the Respondent's explanation as pretextual. Accordingly, we agree with the judge that Hearon's layoff violated Section 8(a)(3) and (1) of the Act, and that the challenge to his ballot should be overruled.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jacee Electric, Inc., Morrisville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff and/or discharge of Robert Hearon, and within 3 days thereafter notify Robert Hearon in writing that this has

[7] Testimony of Justin Waid, Tr. at 65. This testimony, although not specifically cited by the judge, is consistent with the judge's conclusion that "there was no reason for Corelli to assume [during the week that the Respondent laid off Hearon that] he would not need an apprentice/helper for an extended period of time."

[8] During this same conversation with Waid, Corelli asked Waid if any union representatives had visited his worksite and told Waid that "unions are no good[.]" Id. at 66. As stated supra, the judge credited Waid's account of his conversation with Corelli. The fact that Corelli raised the issue of union activity during the same conversation in which he told Waid that no helper would be working with Waid that week supports the conclusion that the real reason for Hearon's layoff had to do with his suspected union activity.

[9] The dissent states that in concluding that the Respondent needed an apprentice or helper during that week, we have substituted Waid's "vague statement" for Corelli's "knowledge of [his] own business operations and staffing needs." Contrary to the dissent's characterization, however, our conclusion is supported by testimony from a *credited* witness, Waid. The dissent, on the other hand, relies on Corelli's *uncredited* and self-serving account of his needs at that time.

[10] Although the dissent states that an electrician's skills (Cowan's) as opposed to a helper's (Hearon's) were needed for the Tramrail job, this job lasted but one day, Monday, February 21. From Tuesday, February 22, until Thursday, February 24, Waid worked without a helper at the Damas job—despite Waid's view, expressed to Corelli on February 22, that a helper was needed. Thus, the fact that Waid worked with Cowan at Tramrail before February 22 is irrelevant to Waid's assertion that the Damas job was of a type where he usually would receive a helper. In addition, although it is true as the dissent points out that Corelli testified that there was no need for a helper, the judge implicitly discredited his testimony by concluding that the Respondent's explanation for Hearon's layoff was pretextual.

been done and that the layoff and/or discharge will not be used against him in any way."

3. Substitute the attached notice for that of the administrative law judge.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days from the date of this Decision, Order and Direction, open and count the ballot of Robert Hearon. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. August 27, 2001

John C. Truesdale Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

With two exceptions noted below, I join my colleagues in adopting the judge's decision. First, I would not find that the Respondent laid off or discharged employee Robert Hearon in violation of Section 8(a)(3) and (1) of the Act. Second, in light of my view that Hearon was not discriminatorily laid off or discharged, I would sustain the Respondent's challenge to his ballot.

The complaint alleged, inter alia, that the Respondent discriminatorily laid off and/or discharged employee Hearon in February 2000.[1] The judge found that the Respondent discriminatorily laid off Hearon on February 24.

The Respondent is an electrical service contractor. Four employees, including two electricians (Waid and Cowan), worked for the Respondent, without interruption, from 1996 until February 2000. In addition to Waid and Cowan, the Respondent regularly employed other individuals to perform electrical work. Some of these individuals were electricians and others were apprentices or helpers. Importantly, however, there were times when the Respondent operated with only Waid and Cowan.

Hearon began working as an apprentice/helper for the Respondent on January 25. Approximately 1 week later, the Respondent hired another apprentice/helper, Vandenberg. On February 15, Waid and Hearon began engaging in union activities, which culminated in a secret ballot election held on March 28. The last day on which Hearon performed electrical service work for the Respondent was February 17. On that date, Hearon assisted Waid with electrical service work during the morning. After they completed their work, Waid and Hearon spoke to Corelli, the Respondent's president, by telephone. Corelli informed them that there was no electrical work for them, and he gave Hearon the choice of either finishing the day doing non-electrical work or going home. During the afternoon, Hearon worked with Waid on non-electrical work. Waid performed electrical service work on February 21, and on February 22, Corelli assigned him to work on a project at the Damas Corporation wiring a machine.

On February 18, Hearon telephoned Corelli. Corelli told Hearon that he did not have any work for him, but to call him back later. On that date, the Respondent discharged Vandenberg.

Hearon called Corelli on February 21, 22, 23, and 24. On February 21, 22, and 23, Corelli told Hearon that he had no work for him, but to call back the next day. On February 24, Corelli told Hearon that there was no point in making further calls, that Hearon could file for unemployment insurance, and that he should look for another job. Corelli did not tell Hearon that the layoff was permanent. Nor did Corelli tell Hearon that he would not recall him if work should ever become available.

With the exception of an employee obtained from a temporary labor agency to replace Waid (who struck on February 25), the Respondent did not hire any employees between February 25 and July 19 (the date of the hearing).

I assume arguendo that the General Counsel has satisfied its initial burden of establishing a prima facie case sufficient to support the inference that Hearon's union activity was a motivating factor in the Respondent's decision to lay him off. However, the Respondent has demonstrated that it would have laid off Hearon even if he had not engaged in protected activity.[2] Specifically, Hearon was laid off at the end of February 17 because there was no available work. On five subsequent occasions, Hearon asked Corelli whether any work was available, and was told that there was none. Ultimately, on February 24, Corelli told Hearon to stop calling him, to file for unemployment insurance, and to look for another job. The Respondent did not obtain another employee to replace Hearon (or Vandenberg, the other discharged apprentice/helper). Indeed, as stated above, with one

[1] All dates refer to 2000 unless otherwise indicated.

[2] See, e.g., *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

exception, the Respondent apparently did not hire any other employees between February 25 and July 19.

The judge found that the Respondent did not provide a persuasive economic justification for Hearon's layoff, and he stated that, even if the Respondent did not have any work for Hearon between the afternoon of February 17 through 24, its alleged history of employing apprentice/helpers would indicate that, on February 24, the Respondent would reasonably expect to employ Hearon in the near future.

These findings are undercut by the following facts. First, the Respondent has sometimes operated without help for Waid and Cowan. Second, Corelli, after discharging Vandenberg, the other apprentice/helper, repeatedly told Hearon that there was no available work. Finally, and most significantly, aside from replacing striker Waid, the Respondent hired no other employees between February 25, and July 19. The fact that the Respondent did not hire any other employees for at least the next 5 months (until the date of the hearing) demonstrates that Hearon was laid off because there was no work for him. The General Counsel argues, in the alternative, that even if the layoff were lawful, Hearon had a reasonable expectation of recall, and thus his vote should count. I disagree that he had a reasonable expectation of recall. Based on the facts set forth above, and on the fact that the Respondent is a small electrical service contractor with fluctuating sales, it has not been shown that the Respondent would have a future staffing need for Hearon.

My colleagues maintain that the judge was warranted in finding that the Respondent's explanation for laying off Hearon was pretextual. In this regard, my colleagues rely on three factors: (1) Corelli's testimony that the Respondent normally needed additional help in the winter; (2) the assertion that there was no relationship between Respondent's sales and the number of electrical workers it employs; and (3) the Respondent's allegedly varying rationales for its conduct.

The contentions have no merit. As to the first matter, the fact that Respondent "normally" needs additional help in the winter does not show that it needed additional help in the remaining month of the winter of 2000. Hearon was laid off in late February. Thus, two-thirds of the winter had gone by, and Respondent made the assessment (correctly, as it turns out) that it did not need additional help in the remaining 1 month of that particular winter. My colleagues contend that Waid's testimony (that work during the week of February 22 "was busy") demonstrates that the Respondent needed an apprentice or a helper during that week. I disagree. My colleagues have substituted Waid's vague statement for the Respondent's knowledge of *its own* business operations and staffing needs. Further, contrary to my colleagues' contention, the record does not support a finding that the Respondent needed additional help from apprentices or helpers during the week of February 22. Waid testified that, during the week of February 22, he worked on two projects—Tramrail and Damas Corporation—before striking on February 25. He further testified that he thought that he worked with Bill Cowan, the Respondent's other electrician, on the Tramrail project, and that the Tramrail job required two *electricians*. It is undisputed that the Respondent's electricians possess skills that apprentices or helpers do not possess. The Tramrail job required two electricians. If Cowan worked, there were two. In any event, there was no need for a helper or apprentice. Regarding the Damas Corporation project, Corelli, the Respondent's president, testified that, contrary to Waid's belief that he needed assistance, the project required only one worker. Corelli further testified that he only gives his electricians additional help if he is "positive" that additional help is necessary, because his customers, with whom he "clear[s]" requests for additional help, have to pay for "time and material, and they don't want two guys there unless they absolutely need it." Contrary to this testimony, my colleagues would impose on the Respondent the economic burden of sending additional employees to jobs even if these employees are not needed.

The majority says that the aforementioned testimony of Waid was credited and that the testimony of Corelli was "uncredited." The fact is that employee Waid gave his opinion that an apprentice was needed during the week of February 22; Respondent president Corelli gave a contrary opinion. Corelli's testimony was uncontradicted and was not discredited. In my view, both witnesses are credible. They each gave an honest opinion as to staffing requirements. The difference is that, in my view, the Respondent, as entrepreneur, is the one who gets to call the shot. I also note that, based on subsequent non-hiring, Corelli's opinion turned out to be well-founded.

The support for my colleagues' second assertion is insubstantial. They rely on the judge who in turn relied on the fact that employee Conrad was hired in October and worked through November 1999. My colleagues suggest that this was a low period for sales. However, the figures were for the entire period of June 1999-May 2000, not for any particular months in that period. In any event, this single example does not support the broad assertion that there is no relationship between sales and numbers of people employed. Indeed, the statement itself belies economic common-sense.

Finally, there are no inconsistent rationales. Respondent laid off Hearon "for cause", i.e., because there was insufficient work.

In sum, the Respondent has shown that, based on the unavailability of work for Hearon, it was justified in laying him off, and the challenge to his ballot should be sustained.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT layoff or otherwise discriminate against any of you for supporting International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT promise increased benefits and improved terms and conditions of employment to employees to induce employees not to select the Union as their collective-bargaining representative.

WE WILL NOT threaten to close our business if you select International Brotherhood of Electrical Workers, Local Union No. 269, AFL–CIO, or any other union, as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Robert Hearon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Hearon whole for any loss of earnings and other benefits resulting from his layoff and/or discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff and/or discharge of Robert Hearon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff and/or discharge will not be used against him in any way.

JACEE ELECTRIC, INC.

Michael C. Duff, Esq., for the General Counsel.
David Truelove, Esq. (Curtin & Heefner), of Morrisville, Pennsylvania, for the Respondent/Employer.
Richard T. Aicher, Assistant Business Manager, IBEW Local 269, of Trenton, New Jersey, for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 19, 2000. The charge in the unfair labor practice case was filed February 25, 2000, alleging among other things the discriminatory discharge of Robert Hearon. The representation case arises out of a secret ballot election conducted on March 28, 2000. In that election, one vote was cast in favor of representation by the Union, Local 269 of the IBEW, and one vote was cast against such representation. There were three challenged ballots, including that of Robert Hearon.

On May 12, 2000, the Regional Director issued the complaint in the unfair labor practice case and determined that a hearing was warranted on the challenges to the ballots of Robert Hearon (by the employer) and Ann Cowan (by the petitioner). Although Respondent excepted to that determination, the Board affirmed it. The representation hearing and the unfair labor practice hearing were then consolidated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Jacee Electric, Inc. is an electrical service contractor, with its principal office located in Morrisville, Pennsylvania. It annually performs services valued in excess of $50,000 at locations outside the Commonwealth of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, IBEW Local 269, is a

labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent discriminatorily laid off and/or discharged employee Robert Hearon in February 2000. He also alleges that Jacee violated Section 8(a)(1) by interrogating Justin Waid about his union activities, promising him benefits if he withdrew his support for the Union, and threatening Waid that it would close its business if employees chose the Union as their bargaining representative.

The issues in the representation case are whether Robert Hearon's and Ann Cowen's ballots should be counted. With regard to Hearon, it is necessary to decide whether his employment was legally terminated by Respondent and if he was laid off, whether the layoff was temporary or permanent. With regard to Ann Cowan, the issue is whether her duties place her within the bargaining unit, which consists of electricians, apprentices, and helpers.

A recent history of Respondent's workforce

Jacee Electric is an electrical service company with an office in Morrisville, Pennsylvania, a suburb of Philadelphia. Jacee's president, John Corelli, lives in Boca Raton, Florida, and runs his company from Florida. Four of Jacee's employees worked for it without interruption from 1996 until February 2000. One of these, Joan Dunsavage, is a part-time billing clerk. Two, Bill Cowan and Justin Waid, are electricians. The fourth is Ann Cowan, Bill Cowan's wife.

Bill and Ann Cowan are both paid an annual salary by Jacee, whereas other employees are paid by the hour. In addition, the Cowans live rent-free in the building which also houses Jacee's office. Ann Cowan works about 20 hours per week.[1] She maintains the building and grounds in which her apartment and Jacee's office is located, runs errands for Jacee and occasionally assists electricians, primarily by operating the controls of the company's bucket truck from the ground.[2] However, unlike other employees who have occasion to assist electricians, Ann Cowan does not work with tools, nor does she work off ladders. Additionally, Corelli has never administered her a test regarding her knowledge of electricity as he has done with electrical apprentices or helpers.[3]

Respondent has also regularly employed other individuals to do electrical work. Some of these employees have been electricians. Others have been apprentices or helpers, who pull electrical circuits, fix outlets, and install lighting, but do not perform work with live equipment. While at times, Jacee has operated without significant help for Waid and Bill Cowan, at other times one or more electricians and/or apprentice/helpers has worked for it regularly for an extended period of time.

There appears to be no relationship between Jacee's sales and the number of electrical workers it employs. In June, July, and August of 1999, Waid and Cowan received substantial assistance from helper Jason Conrad and electrician John Churchray. However, from the week ending August 20, 1999, until the week ending October 1, 1999, after Conrad had taken another job, Waid and Bill Cowan did almost all of Jacee's electrical work themselves (GC Exh. 5). In October 1999, Jacee's sales were the lowest they ever were for the period June 1999-May 2000. However, during that month, Jason Conrad returned to Jacee and worked 21 hours the week ending October 8; 40 hours the week ending October 15; 51¾ hours the week ending October 22; and 37½ hours the week ending October 29. In addition, electrician John Churchray worked about 41 hours for Jacee that month.

Jason Conrad continued to work a substantial number of hours for Respondent until late November 1999. Within about 2 weeks of the termination of Conrad's employment in November 1999, Jacee rehired apprentice/helper, Joseph Hatcher. Hatcher worked for Respondent until January 21, 2000. For the 3 weeks before the end of his employment, Hatcher worked between 23-½ and 26 -¼ hours per week. A few days after Hatcher left Jacee's employment, apprentice/helper Robert Hearon began working for Respondent. About a week later, Jacee also hired apprentice/helper Charles Vandenberg.[4]

Robert Hearon's employment with Jacee

Robert Hearon worked just 15 days for Respondent. He began on January 25, 2000 and worked 4 days that week as helper to electrician Bill Cowan at a shopping center project. The next week he assisted Justin Waid. On Monday, February 7, Hearon missed work due to a dental emergency. He worked with Waid for the next 2 days. On February 10, there was no electrical work available for Hearon. In a telephone conversation, Corelli asked Hearon to do some painting at a rental property he owned. Hearon objected to this assignment and did not work that day or the next, Friday, February 11.

However, Hearon worked with Justin Waid performing electrical work from Monday, February 14, until 11:15 a.m. on Thursday, February 17. On the 15th of February, Organizer Dennis Doyle approached Hearon and Waid while they ate lunch at a Burger King in Mt. Holly, New Jersey. The following evening, both employees went to the union hall and signed authorization cards. On February 17, the Union filed a representation petition, a copy of which was faxed to Respondent, and was received by Corelli at approximately 12:41 p.m.

On the morning of February 17, Hearon and Waid performed electrical service work from 8:45 until 11:15 a.m. Sometime after they completed their work, they spoke to Corelli by tele-

[1] Ann Cowan receives an annual salary of $10,400. This is equivalent to $10 per hour for 20 hours of work a week for 52 weeks per year.

[2] From March 1, 1999, through February 25, 2000, Ann Cowan performed no more than 78 hours of billable labor (work related to Jacee's electrical service business) for Respondent. This represents about 7.5 percent of the hours for which she was paid during that year. The Union in its brief, at pp. 11 and 12, specifies the dates on which she performed such work. These dates cannot be determined from the copy of union Exhibit 3 that is in the record.

[3] Respondent's payroll records places employees in three categories: Department 1 officer (Corelli); Department 2 office (Dunsavage and Ann Cowan); and Department 3 direct labor (e.g., Waid, Bill Cowan, Robert Hearon, and Charles Vandenberg). Ann Cowan was added to the *Excelsior* list 5 days after Respondent submitted its initial list with only the names of Bill Cowan and Justin Waid.

[4] John Churchray worked 13 hours for Respondent during the week ending January 28, 2000.

phone.[5] Corelli informed Hearon and Waid that there was no electrical work for them to do. He gave Hearon the choice of finishing the day doing nonelectrical work or going home. Hearon worked with Waid that afternoon doing nonelectrical work, installing or fixing a fire and security alarm at a rental property owned by Corelli.

The next day, Friday, February 18, Hearon called Corelli, who told him that he had no work for him, but for Hearon to call him back later. The same day, Corelli discharged Charles Vandenberg.[6] Justin Waid performed non-electrical work on the 18th.

Hearon called Corelli every day from Monday, February 21 through Thursday, February 24. On the first 3 days, Corelli told Hearon that he had no work for him that day, but also told him to call back the next day. On the 24th, Corelli told Hearon to stop calling him, file for unemployment insurance, and look for another job. Corelli did not tell Hearon that the layoff was permanent or indefinite and did not tell him that he would not recall him if work picked up. Indeed, at hearing, Corelli indicated he would recall Hearon if he had sufficient work.[7]

Corelli's conversations with Justin Waid on February 22, and 23, 2000

Justin Waid performed electrical service work on Monday, February 21, 2000. The next day, John Corelli assigned Waid to work on a project at the Damas Corporation, wiring a machine. Waid asked Corelli if he was going to have a helper to assist him. Corelli answered negatively. Corelli then asked Waid if any union representatives had been to any of his jobs. Waid said no. Then Corelli told Waid that unions were no good for employees like Waid because they would make him start from the bottom again.

On February 23, 2000, the Union sent John Corelli a letter, by fax, identifying Justin Waid as a volunteer organizer. Corelli immediately paged Waid at work. He asked Waid if the letter from the Union was accurate. When Waid said that it was accurate, Corelli asked if Waid knew what would happen to his business if it went union. Then Corelli said that Waid could hire an accountant through the company to let Corelli know if the business "will make it or not."

Corelli also asked Waid what it would take to get him to stop supporting the Union. Corelli offered Waid a raise, a 401(k) plan, and an employment contract. Finally, Corelli told Waid to write down anything else he could think of that he wanted.[8]

The morning of Friday, February 25, Waid went on strike.[9] Robert Hearon joined him on the picket line. Respondent obtained an employee from a temporary labor agency to replace Waid; it apparently hired no other employees between February 25, and July 19, 2000.

ANALYSIS

Respondent violated Section 8(a)(1) and (3) in laying off Robert Hearon on February 24, 2000

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus, or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[10] Once the General Counsel had made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

Union activity and employer knowledge

Robert Hearon engaged in union activity by signing an authorization card on February 16, 2000. Although I conclude that the General Counsel has not established that Respondent knew of its employees' union activity at the time of Corelli's February 17, 2000 telephone conversation with Hearon, it became aware of this activity within hours. Although Corelli did not have direct evidence that Hearon supported the Union until February 25, I conclude that the knowledge element of the General Counsel's case has been satisfied nevertheless. I infer Respondent's knowledge of Hearon's union activity from the totality of the circumstances in this case, which include: the timing of his layoff; Jacee's general knowledge of its employees' union activities gained from the representation petition and the union's letter identifying Waid as a volunteer organizer; evidence of antiunion animus and the pretextual nature of Jacee's explanation for the layoff, *North Atlantic Medical Services*, 329 NLRB 85 (1999).

Given the fact that Jacee only employed four electrical employees, I infer that when Corelli received the copy of the representation petition on February 17, he suspected that his two

[5] It is unclear whether this telephone conversation occurred before or after Corelli received the fax from the NLRB regarding the union's representation petition. Based on Hearon's and Waid's timecards, I conclude it is more likely this conversation occurred shortly after they finished the electrical job at 11:15; thus prior to Corelli's receipt of the fax.

[6] Vandenberg worked 29½ hours in the week ending February 18 and 33-½ hours in the week ending February 11. The Union filed a charge alleging that Vandenberg was discharged in violation of the Act. The Union did not include this allegation in its amended charge and the General Counsel did not include it in the complaint. As a consequence the Regional Director sustained Jacee's challenge to Vandenberg's ballot. The Union apparently did not except to this determination.

[7] Respondent appears to have abandoned the contention, made in its answer, that Hearon was "discharged/laid off" because he had frequently become unavailable for work and had absented himself voluntarily from work, as well as for lack of work. At hearing, Corelli testified that he would probably would not have laid Hearon off if he had enough work.

[8] I credit Waid's account of his conversations with Corelli, which Corelli did not contradict. Indeed, Corelli admitted that he told Waid he did not think his company could afford unionization.

[9] Tr. 69, line 10, should read "unfair labor practice strike", instead of "apprentice strike."

[10] *Flowers Baking Co., Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

newly hired employees, Hearon and Vandenberg, were among the union supporters.[11] Timing of the adverse personnel actions also supports the inference of knowledge, animus, and discriminatory motive. I infer that Corelli suspected Hearon and Vandenberg of union sympathies in part from the fact that Hearon did not work for Jacee after February 17, and Vandenberg was fired the next day.[12] Finally, it is significant that Hearon was laid off the day after Corelli discovered that Waid was also a union supporter. On this discovery, Corelli would have realized that if Waid and Hearon voted in the representation election, the Union might prevail—particularly in view of the doubtful proposition that Ann Cowan was eligible to vote.

Animus

I also draw the inference that Corelli suspected Hearon of union sympathies and laid him off as a result of those sympathies because Corelli's conversations with Waid establish antiunion animus and because I find Respondent's rationale for Hearon's layoff to be pretextual. His conversations with Waid establish that Corelli was willing to go to great lengths to avoid unionization by offering Waid benefits that he had never offered him before.

Pretext as evidence of discriminatory motive.

Jacee has not provided a persuasive economic justification for the layoff. I do not credit Corelli's testimony that he had laid off employees previously. There is no evidence to support this assertion other than his bald assertion that he has done so. Indeed, Respondent's payroll records indicate that it regularly employed apprentice/helpers for extended periods, albeit on a part-time basis, even when its sales figures temporarily declined.

There is no convincing rationale that explains Corelli's decision to layoff Robert Hearon on February 24. Assuming that Jacee did not have sufficient business to employ Hearon between 11:45 a.m. on February 17, through the morning of February 24, Respondent's past history would indicate that Corelli would reasonably expect to be able to employ Hearon in the near future. This is so regardless of whether business in fact picked up after February 24.

In this regard, Corelli testified that he normally needed additional help in the winter and the summer, as opposed to the spring and the fall. When he laid off Hearon, there was another month of winter left and there was no reason for Corelli to assume he would not need an apprentice/helper for an extended period of time. Moreover, Jason Conrad's work history indicates that Respondent regularly had need for an apprentice/helper when one was available. Respondent's sales figures suggest that Jacee had as great a need for a helper/apprentice on February 24, 2000, and thereafter as it did when Jason Conrad worked for it. On this basis, I conclude that Respondent's explanation of the layoff of Robert Hearon is pretextual and is thus evidence of discriminatory motivation, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897,898 (1988), *Shattuck Denn Mining Corp.*, 362 F. 2d 466, 470 (9th Cir. 1966).

Shifting rationale for Hearon's termination

Additionally, I infer discriminatory motive from Respondent's shifting or vacillating explanation Hearon's termination. In its answer, it suggests he was fired for cause; at hearing, it abandoned this contention. The Board has long held that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for it conduct is not among those asserted, *Black Entertainment Television*, 324 NLRB 1161 (1997); *Sound One Corp.*, 317 NLRB 854, 858 (1995). In conclusion, I find that Respondent laid off Robert Hearon on February 24, because it suspected him of union sympathies and because it realized that it was more likely to prevail in the representation election if Hearon was ineligible to vote.

Respondent violated the Act on February 23, in promising benefits to Justin Waid while a representation petition was pending and intimating that unionization would force it to close and in interrogating Waid about employees' union activities on February 22

John Corelli's efforts to wean Justin Waid from supporting the Union also violated the Act, as alleged in complaint paragraph 5(b) (iii) and (iv). Granting or promising benefits during the pendency of a representation election is prima facie evidence of intentional interference with Section 7 rights. Such action is presumed to be for the illegal object of influencing employees, *Philips Industries*, 295 NLRB 717, 731 (1989); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).[13] As Justice Harlan stated in *Exchange Parts*, supra:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.
>
> 375 U.S. at 409.

Respondent also violated the Act by Corelli's invitation to Waid to retain an accountant at company expense to tell Corelli whether his company could afford unionization. This "invitation" reasonably suggested to Waid that if he continued to support the Union and if the Union won the representation election, Jacee would be forced to go out of business. There is no evidence that this suggestion had any objective basis in fact; it was therefore coercive and violated Waid's Section 7 rights, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969); *Soltech, Inc.*, 306 NLRB 269, 272 (1992).

Corelli also violated Section 8(a)(1) by asking Justin Waid on February 22, if any union representatives had been to any of Jacee's jobs. The question necessarily involved an inquiry into

[11] This inference is strengthened by the fact that so far as Corelli knew, neither Waid nor Bill Cowan had indicated any interest in unions during the years they had worked for him. Indeed, Corelli appeared to be surprised when he was informed that Waid was one of the union's supporters.

[12] This inference is not necessarily undercut by the fact that neither the Union nor the General Counsel pursued an unfair labor practice on behalf of Vandenberg. It could be, for example, that Respondent would be able to meet its affirmative defense with regard to this employee.

[13] No evidence was offered to rebut this presumption.

the union activities of employees at a time when Corelli knew some employees, but not which employees, were exhibiting union sympathies. On the other hand, I do not find that Corelli coercively interrogated Waid, when he called him on February 23. By this time, Waid had already been identified as a volunteer organizer by the Union. I see nothing coercive in Corelli's asking Waid to confirm that the letter from the Union about his status was accurate. Similarly, I find nothing coercive about Corelli's statements to Waid on February 22, that, "unions are no good for you, you've got to start all over, start from the bottom again."

The General Counsel argues that Corelli's statements are analogous to an employer's pronouncement that negotiations with a union would "start from scratch". Statements of this nature are coercive when they effectively threaten employees with a loss of existing benefits and leave them with the impression that what they may ultimately receive depends on what the Union can induce the employer to restore, *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). Corelli's statement on February 22, did not refer to outcome of company's negotiations with the Union and suggested, if anything, that the Union may have requirements regarding Waid's status. I deem Corelli's comments not coercive in part because Waid would able to dispel any concerns he had as a result of Corelli's comments by simply making inquiries to the Union.

The challenge to Robert Hearon's ballot is overruled

Since Respondent illegally laid off Robert Hearon on February 24, he was still its employee through the eligibility period ending February 25, and as of the date of the election, March 28, 2000. Even had it been a nondiscriminatory temporary layoff, Hearon would remain an eligible voter, *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). Moreover, there is absolutely no credible evidence for the proposition that Hearon was permanently laid off for nondiscriminatory reasons. Respondent's past practice in employing at least one helper/apprentice despite declines in its sales, establishes that on an objective basis, Hearon would have had a reasonable expectation of being recalled, had Respondent dealt with him in nondiscriminatory fashion. Given this past practice, Corelli's silence regarding the likelihood of Hearon's recall, is not dispositive as to whether Hearon would have had a reasonable expectation of recall.

The Union's challenge to the ballot of Ann Cowan is sustained.

The Union sought representation of "all full time and regular part-time electricians, apprentices and helpers employed by the Employer at its 434 Bridge Street, Morrisville, Pennsylvania facility." Given the fact that the Union generally represents electrical employees, it is reasonable to assume that by apprentices and helpers, it sought representation of those apprentices and helpers performing work associated with Respondent's electrical service work, and not an employee who exclusively performed janitorial/caretaker and office duties at Respondent's property.

The only legitimate basis for including Ann Cowan in the bargaining unit would be if she was a "dual function employee", who performed a sufficient amount of bargaining unit work to demonstrate that she has a substantial interest in the wages, hours, and working conditions of the unit employees, *Bonanno Family Foods, Inc*, 230 NLRB 555 (1977); *Berea Publishing Co.*, 140 NLRB 516, 517 (1963); *Ocala Star Banner*, 97 NLRB 384 (1951). I conclude that the approximately 7 ½percent of her paid time for which Ann Cowan assisted electricians is insufficient to make her an eligible voter.[14] Moreover, the fact that unlike other employees, she did not work with tools nor was ever tested on her knowledge of electricity, also suggests that Ann Cowan did not share a work-related community of interest with unit employees. I therefore sustain the challenge to Ann Cowan's ballot.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) and (3) by laying off Robert Hearon on February 24, 2000.

2. Respondent violated Section 8(a)(1) by interrogating Justin Waid about employees' union activities on February 22, 2000

3. Respondent violated Section 8(a)(1) on February 23, 2000, in threatening to close its business if employees selected the Union as their collective-bargaining representative, and in promising Justin Waid a raise, a 401(k) plan, an employment contract, and other benefits, if he abandoned his support for the Union.

4. Robert Hearon was eligible to vote in the representation election on March 28, 2000.

5. Ann Cowan was not eligible to vote in the representation election on March 28, 2000.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off Robert Hearon, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Jacee Electric, Inc., Morrisville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[14] The Board has found similar amounts of time performing unit work insufficient to make an employee an eligible voter in *Bonnano Family Foods*, supra, [3-½hours per week, less than 20 percent of work hours] and *Manhattan Construction Co.*, 298 NLRB 501 (1990) [5–10 percent of working time].

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Laying off, or otherwise discriminating against any employee for supporting IBEW Local 269, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Promising benefits to unit employees during the pendency of a representation petition.

(d) Threatening to close its business if employees select the Union as its collective bargaining representative.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Hearon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Hearon whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Morrisville, Pennsylvania facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 22, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

(g) IT IS RECOMMENDED that the Regional Director for Region 4 shall within 14 days from the date of this Decision, open and count the ballot of Robert Hearon, and prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. September 20, 2000

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT layoff or otherwise discriminate against any of you for supporting Local 269 of the International Brotherhood of Electrical Workers (IBEW), or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to close our business if you select IBEW Local 269, or any other union, as your collective-bargaining representative.

WE WILL NOT promise you benefits to encourage you to abandon your support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Hearon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Hearon whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

JACEE ELECTRIC, INC.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."